



State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2002

RECENT DEVELOPMENTS REGARDING THE SEX OFFENDERS REGISTRATION ACT

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In the November/December 1999 issue of *Notes on the Budget and Economy*, the Senate Fiscal Agency published an article examining the evolution of Michigan's Sex Offenders Registration Act (SORA) (<http://www.senate.state.mi.us/sfa/Publications/Notes/notes.html>). That article reviewed how sex offender registration had expanded from being strictly a tool for law enforcement officials to providing a source of public information, to serving as a conduit for Federal funding for various law enforcement programs.

Under the Act, people convicted of or placed on youthful trainee status for certain crimes, and juveniles adjudicated in the family division of the circuit court (family court) under the juvenile code for certain actions that would be crimes if committed by an adult, must register information about their identity, address, and conviction with a law enforcement agency. This information is included in the sex offender registry maintained by the Michigan Department of State Police, which is accessible only for law enforcement purposes. In addition, the Department must compile certain information from the registry and make the compilation available to the public.

Recently, court cases have challenged the law's constitutionality in both Federal and State courts, and legislation to amend the Act has been proposed in the current legislative session. This article reviews these recent developments.

Court Challenges

On consecutive days in June 2002, the Federal District Court for the Eastern District of Michigan and the Michigan Court of Appeals issued rulings in cases challenging the constitutionality of Michigan's SORA. On June 3, the Federal District Court ruled the Act unconstitutional; on June 4, in a different case, the Michigan Court of Appeals upheld SORA's constitutionality. The Federal Court, however, modified its ruling on June 25, reinstating part of the Act and reiterating its earlier findings in part.

Fullmer v Michigan Department of State Police

This case was brought by an individual convicted of an offense that requires registration under Michigan's Sex Offenders Registration Act. The defendants are the Michigan Department of State Police and the Department Director. The plaintiff alleged that SORA violated constitutionally protected procedural due process.

On June 3, 2002, the U.S. District Court for the Eastern District of Michigan issued a declaratory judgment that the Act was unconstitutional under the Fourteenth



State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2002

Amendment to the U.S. Constitution. The Court enjoined the State from further enforcement of the Act until it provides sex offenders "adequate procedural safeguards for their constitutionally protected interests". On June 25, 2002, in response to a motion by the State to stay the judgment pending appeal, the Court denied the request for a stay but modified its original ruling.

In the opinion issued on June 3, the Court reviewed SORA, the history of the Act and its Federal mandate, and previous court cases that had challenged sex offender registration laws in Michigan and other states. In doing so, the Court noted that SORA "does not provide any means by which individuals required to register can contest the listing" of information in the sex offender registry. The Court found that the plaintiff "sufficiently demonstrated a liberty interest...deserving of minimal due process protection", and struck down SORA "as an unconstitutional denial of due process" because it "does not provide notice to registrants or an opportunity to be heard".

In reaching that conclusion, the judge applied what has become known as the "stigma plus" test. Under that concept, reputation alone is not a constitutionally protected liberty or property interest, but procedural due process is triggered when the damage to reputation is coupled with another interest. So, the stigma of being listed on a public registry, in itself, is not an infringement on due process rights but, together with a "plus" factor that deprives a registrant of a previously held right, registration could be a violation of due process. The Court found compelling the plaintiff's argument "that obligations of registration and attendant penalties for non-compliance with the SORA alter his legal status".

The judge found that previous rulings in the Sixth U.S. Judicial Circuit (which includes Michigan) did not consider whether the continuing legal obligations of people subject to sex offender registration and the penalties for failure to comply with those obligations were "a sufficient 'plus' factor to alter the legal status of sex offender registrants in such a way that their constitutionally protected liberty interests are put in peril". She cited rulings in other U.S. circuits, however, that found this to be a sufficient "plus" factor. Based on those cases, the *Fullmer* Court ruled "that the burdens of registration and the attendant alteration of...legal status" were sufficient "plus" factors.

Since the judge determined that SORA's public notification ("stigma") and continuing registration ("plus") provisions implicated liberty interests deserving of due process protection, the Court then examined whether registrants were afforded procedural safeguards. The Court ruled that "Michigan's SORA must be invalidated because it provides no opportunity to be heard on whether, and to what extent, public notification of sex offenders' registry information is necessary to protect the public, and the extent to which the registration requirements should burden sex offenders, when balanced against the need to protect the public".



State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2002

Fullmer Modified

On June 25, the same Federal District Court denied the State's motion for a stay of the Court's June 3rd decision pending appeal to the Sixth Circuit Court of Appeals, but modified the original ruling. Under the later ruling, the State still is enjoined from enforcing the public disclosure sections of SORA, but may resume requiring sex offender registration, and information in the registry may be used for law enforcement purposes.

In the June 25th ruling, the court pointed out that SORA actually creates two separate registries: one registry that is maintained for law enforcement purposes (which is confidential and not subject to the Freedom of Information Act), and a second compilation of information primarily for the public. The Court held that its earlier due process analysis would not apply to a registry that could not be disclosed to the public. In addition, the Court agreed with the State's contention that, under the earlier ruling, police no longer had access to information in the law enforcement registry and were unable to track convicted sex offenders. In addition, the June 3rd ruling put the State at risk of losing millions of dollars in Federal funding because the injunction prohibited it from complying with requirements for those grants.

For those reasons, the Court dissolved the injunction against the provisions of SORA that are "necessary for the maintenance and enforcement of the law enforcement sex offender registry, including the registration requirements, ...the notice requirements, ...and the attendant penalties".

Regarding the public availability of sex offender registry information, however, the Court stated:

If the Court were to stay the injunction against the public sex offender registry, Plaintiff and others like him would suffer a continuing constitutional injury and deprivation, because they have no opportunity to establish that they are not presently dangerous or likely to become dangerous in the future. In other words, they have no opportunity to demonstrate they should not be on a public sex offender registry which implies they are persons from whom the public must be protected.

Under the June 25th ruling, the defendants continue to be "enjoined from the public disclosure provisions of the SORA until they first afford sex offenders with an opportunity to be heard on the issues of whether they are a dangerous threat to the public", before being required to register under the Act.



State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2002

People v Wentworth

On June 4, 2002, the day after the first *Fullmer* ruling, the Michigan Court of Appeals decided an appeal of a juvenile adjudication for second-degree criminal sexual conduct (which requires sex offender registration after the juvenile reaches 18 years of age). The Court concluded "that the requirements of SORA are not an unconstitutional infringement of...protected liberty, property, or privacy interests, and that the state is not required to engage in due process beyond that afforded in...court proceedings before including information...in the public database of registered sex offenders".

In reaching that conclusion, the *Wentworth* Court relied on a 1998 case in the U.S. District Court for the Eastern District of Michigan. In *Lanni v Engler* (994 F Supp 849), the Court held that a defendant must show that SORA deprives him or her of a protected liberty or property interest in order to prevail on a due process argument, and found that the Act does not violate the due process rights of a convicted sex offender. The *Lanni* Court held that SORA "merely compiles truthful, public information and makes it more readily available" and that any detrimental effects suffered because of the Act flow from the offender's own misconduct and citizen reaction to it "and only tangentially from state action".

The rulings in *Fullmer*, however, effectively overrule the *Lanni* decision and make the *Wentworth* holding moot, unless *Fullmer* is reversed on appeal.

Proposed Legislation

Senate Bill 1275

The Campus Sex Crimes Prevention Act, a Federal law enacted on October 28, 2000, requires that convicted sex offenders enrolled at or employed by an institution of higher education register the name of that college or university with the police. Also, this information must be made available to the police agency with jurisdiction over the campus, and each institution of higher education must issue a statement advising the campus community where the information concerning registered sex offenders can be found. Apparently, the Act was aimed at closing a loophole in many states' laws that require sex offenders to register with the police agency near their permanent residence, but fail to address students and others who live part of the year on a campus.

States that do not comply with the requirements of the Campus Sex Crimes Prevention Act are subject to a mandatory 10% reduction of the formula grant funding available under the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, which is administered by the U.S. Bureau of Justice. Under the Federal Jacob Wetterling Crimes Against Children and Sexually



State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2002

Violent Offender Registration Act, Byrne funds withheld from noncompliant states are redistributed to those states in compliance.

Senate Bill 1275 (S-1), as passed by the Senate on May 16, 2002, would amend the Sex Offenders Registration Act to meet the Federal requirements of the Campus Sex Crimes Prevention Act. The bill would require certain sexual offenders who are employed by or students at Michigan institutions of higher education to report their sexual offense status to the law enforcement agency with jurisdiction over the campus. The State's sex offender registry would have to contain information required under the bill, and the computerized data base of registrations maintained by the State Police would have to include the name and campus location of each institution of higher education to which an individual had to report. The bill also would require the State Police to "provide the ability to conduct a computerized search" of the publicly available compilation of the sex offender registry based on the name and campus location of an institution of higher education.

On June 19, 2002, the Michigan House of Representatives amended Senate Bill 1275 (S-1) to include the following legislative declaration:

The legislature declares that the Sex Offenders Registration Act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

House Bills 5163 and 5891

The Sex Offenders Registration Act provides that a juvenile tried as an adult and convicted of a listed offense, or a person assigned to youthful trainee status for a listed offense, must be placed on the State Police registry and the public compilation. Information about a juvenile adjudicated in the family court under the juvenile code, however, is not placed on the publicly available compilation unless he or she receives a disposition for first- or second-degree criminal sexual conduct (CSC), in which case the juvenile's information must be placed on the compilation after he or she reaches the age of 18.



State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2002

Some people have raised concerns that the registration requirements and the public availability of information in the compilation may be too broad. Reportedly, children as young as 10 have been adjudicated for CSC violations in the family court for actions that essentially amount only to curious touching. In addition, and more commonly, there are situations in which a teen who engages in sexual conduct is convicted of CSC because his or her partner was too young to consent to sexual relations. Those individuals are required to register as sex offenders for at least 25 years if convicted as an adult, or for at least 25 years after reaching 18 years of age if adjudicated as a juvenile for first- or second-degree CSC.

Under House Bills 5163 (H-2) and 5891 (H-2), if an individual were convicted of, or a juvenile were adjudicated responsible for, a CSC offense involving sexual penetration when the victim was less than 16 years old or involving sexual contact when the victim was less than 13, and the victim were within two years of age of that individual, the court would have to determine whether the convicted individual had to be listed on the publicly available compilation of the sex offender registry.

The court would have to place its determination on the abstract of conviction or on the order of juvenile disposition. The Department of State Police could not place an individual on the publicly available compilation if the abstract or order stated that the individual was exempt from registration. The bills identify criteria that a court would have to consider in determining whether an individual was exempt from being listed on the public registry. A court could not exempt an individual if he or she previously had been convicted of or found responsible as a juvenile for first-, second-, third-, or fourth-degree CSC or assault with intent to commit CSC.

Expected Action

On June 5, 2002, the Attorney General appealed to the U.S. Sixth Circuit Court of Appeals the June 3rd Federal District Court ruling that the Sex Offenders Registration Act was unconstitutional. According to reports published after the June 25th modification of that ruling, the Attorney General still is appealing the District Court decision that the registry may be available only to law enforcement, and is considering whether to request a stay of that decision by the Federal appellate court.

On July 9, 2002, the Senate ordered Senate Bill 1275 enrolled and sent it to the Governor for his signature. At this time, House Bills 5163 and 5891 remain before the House of Representatives. (The status of the bills and analyses of them are available at <http://michiganlegislature.org/>.)